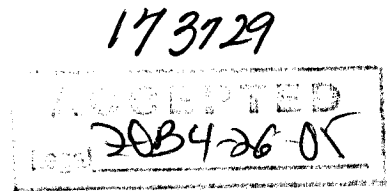


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April 26, 2005

*ALSO ADMITTED IN TX
**ALSO ADMITTED IN VA

VIA HAND DELIVERY
AND ELECTRONIC MAIL

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Application of Carolina Water Service, Inc. for adjustment of rates and charges for the provision of water and sewer service and modification of rate schedules; Docket No. 2004-357-WS

Dear Mr. Terreni:

Enclosed for filing please find the original and five (5) copies of the Applicant's Motion to Strike, Supporting Memorandum and Exhibit in the above-referenced matter.

By copy of this letter, I am serving counsel for all parties of record with a copy of same and enclose a certificate of service to that effect. I would appreciate your acknowledging receipt of this letter and the attached document by date-stamping the extra copy that is enclosed and returning it via the courier delivering same.

If you have any questions or if you need any additional information, please do not hesitate to contact us.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

JMSH/twb
Enclosures

cc: C. Lessie Hammonds, Esquire
Florence P. Belser, Esquire
Jessica J.O. King, Esquire
Carlisle Roberts, Jr., Esquire
Scott Elliott, Esquire
Charles Cook, Esquire
(All via U.S. Mail, email and fax)

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-357-W/S

RECORDED
2005 APR 26 PM 1:31
SC PUBLIC SERVICE
COMMISSION

IN RE:)
)
Application of Carolina Water Service,)
Inc. for adjustment of rates and charges)
and modification of certain terms and)
conditions for the provision of water and)
sewer service.)
_____)

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of **Applicant's Motion to Strike, Supporting Memorandum and Exhibit** via facsimile, e-mail and by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

C. Lessie Hammonds, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
Fax #: 737-0801
hammon@regstaff.sc.gov

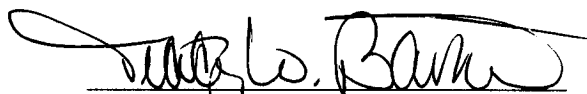
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Tracy W. Barnes

Columbia, South Carolina
This 26th day of April, 2005.

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-357-W/S

RECEIVED
2005 APR 26 PM 1:31
SO. PUBLIC SERVICE
COMMISSION

IN RE:

Application of Carolina Water Service,
Inc. for adjustment of rates and charges
and modification of certain terms and
conditions for the provision of water and
sewer service.

MOTION TO STRIKE

Applicant, Carolina Water Service, Inc., ("Applicant" or "CWS"), pursuant to S.C. Code Ann. Regs. R. 103-840 (1976), hereby moves for an order striking the statement of any witness complaining of a sewer backup in the above-captioned proceeding, including those identified on Exhibit 1 that is attached hereto and incorporated by reference. In support thereof, Applicant would respectfully show as follows:

1. By its Order No. 2005-101 dated March 2, 2005, the Commission directed its Staff to set night hearings in the above-captioned matter. Under the terms of that order, the purpose of such night hearings is to "allow interested customers to appear before the Commission to present evidence concerning the pending rate case Application" and to "provide customers affected by the rate Application a convenient forum in terms of location and time to appear before the Commission to present evidence related to the pending rate case Application." *Id.* at 4, ¶¶ 2-3.

2. In pursuance of Order No. 2005-101, the Commission Staff set night hearings in the instant docket for Monday April 18, 2005 in Summerville, South Carolina, Wednesday, April 20, 2005, at 7:00 p.m. in Irmo, South Carolina, Tuesday, April 26, 2005 in York County, and Monday, May 2, 2005 in Lexington County. Notices of these night hearing were given to customers by way

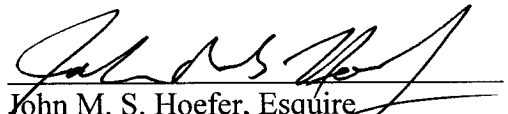
of separate mailing by the Applicant as appears from the affidavit of Steven M. Lubertozzi filed and served April 15, 2005.

3. At each of these night hearings, certain customers stated that either they, or other customers that they knew, had experienced sewer backups which caused damage.

4. As further discussed in the attached memorandum submitted in support of the within motion, customers' complaints regarding sewer backups are not an issue in the instant proceeding and consideration of their statements pertaining to same would constitute reversible error. Neither S.C. Code Ann. § 58-5-240 (Supp. 2004) nor the Commission's Order No. 2005-101 provide for the Commission to consider specific customer complaints regarding Applicant's service in a rate adjustment proceeding. *Cf.* S.C. Code Ann. § 58-5-270 (1976). Accordingly, Applicant would be denied due process were the Commission to consider such statements as evidence in the instant case. *See* S.C. Const. art. I, § 22. Moreover, the Commission lacks jurisdiction to address complaints alleging damages arising from acts or matters alleged to have been done or failed to have been by the Applicant in the conduct of its business. Applicant therefore moves that statements regarding sewer backups given in the night hearings referenced above, or any further statements which may be given in this proceeding pertaining to sewer backups, be stricken from the record in this case on the ground that such matters are not at issue in this docket and that the Commission refuse to consider same.

5. This motion is based upon South Carolina law, the Commission's Rules of Practice and Procedure, the attached supporting memorandum which is incorporated herein by reference¹, and such other matters as the Commission may consider.

WHEREFORE, having fully set forth its motion, Applicant requests that the Commission (1) issue its order striking the statements of customers in the night hearings in these matters pertaining to alleged sewer backups, (2) ruling that such matters are not properly considered in the instant proceeding, and (3) granting Applicant such other and further relief as is just and proper.


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803-252-3300

Attorney for Applicant

Columbia, South Carolina
This 26th day of April, 2005

¹As noted in footnote 1 of the attached memorandum, the Applicant does not concede that such statements are now admitted to the record of evidence in this case and intends to make an objection at the beginning of the May 4, 2005 hearing in this matter.

EXHIBIT 1 TO APPLICANT'S MOTION TO STRIKE

1. Donna Underwood
2. Susan Norcutt
3. Jeff Cohen
4. Morris Bays
5. Annette Hoover
6. Mary Vanbrunt
7. Any other customer who may have made a statement or who does make a statement regarding specific instances of sewer backups.

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-357-W/S

IN RE:

Application of Carolina Water Service,
Inc. for adjustment of rates and charges
and modification of certain terms and
conditions for the provision of water and
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**MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE TESTIMONY**

Applicant submits the within memorandum in support of its Motion to Strike certain statements at the night hearings held and to be held in the instant docket, which motion is filed contemporaneously herewith.

BACKGROUND

By its Order Nos. 2005-92 and 2005-101 in the instant docket, the Commission has directed that night hearings be conducted to “allow interested customers of CWS to appear and present testimony and evidence relevant to CWS’s application,” “to allow interested customers to appear before the Commission to present evidence concerning the pending rate case” and “to provide a convenient forum for the customers of the Applicant to present evidence related to the pending rate case.” To date, the Commission has conducted two such night hearings, one in Summerville, South Carolina and the other in Irmo, South Carolina. Additional night hearings are scheduled in York and Lexington counties. At the night hearings in Summerville and Irmo, customers and former customers of Applicant made statements complaining of specific instances in which sewer backed up into homes and asserted that properties had been damaged by these occurrences.

ISSUE

Should statements regarding specific complaints of sewer backups given in the instant proceeding be stricken where (a) neither S.C. Code Ann. § 58-5-240 (Supp. 2004) nor Commission Order Nos. 2005-92 and 2005-101 provide for the Commission to consider such complaints, (b) the legislature has authorized the Commission to consider such complaints only in a proceeding under S.C. Code Ann. § 58-5-270 (1976), (c) the Commission lacks jurisdiction to address damage claims, and (d) the consideration of such testimony as bearing upon the Applicant's entitlement to rate relief will deprive the Applicant due process? The Applicant submits that the clear answer to this question is no.¹

ARGUMENT

As a creature of statute, the Commission only has such authority as is granted to it by the legislature. *See Kiawah Island Property Owners Group v. S.C. Public Service Comm'n*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) ("The PSC is a government agency of limited power and

¹The Applicant intends to formally object at the start of the evidentiary hearing in this case to the inclusion in the record of the customer statements described in the attached motion. The Applicant submits the within memorandum and the attached motion, however, out of an abundance of caution. It is not clear that the statements of the customers have been admitted into the record of evidence in this case since it has been taken out of the order prescribed by the Commission's rules and the Commission has not noticed that objections and motions directed to testimony at night would be considered. *See* 26 S.C. Code Ann. Regs. R. 103-821.C.(4), 860 and 866 (1976). Moreover, the Commission has traditionally discouraged parties from cross-examination upon or objection to customer statements at night hearings; a departure from that practice would not be warranted in this case without notice to the parties of record. *See 330 Concord Street Neighborhood Association v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (holding that an administrative agency may not act arbitrarily in failing to follow its established precedent). And, contemporaneous objection is not required under the Commission's rules. *See* 26 S.C. Code Ann. Regs. R. 103-873 (1976). Assuming, however, that these statements have been admitted into the record of evidence in this case, it may nonetheless be stricken. *See King v. S.C. State Hwy. Dep't*, 248 S.C. 64, 149 S.E. 2d 64 (1966) (holding, *inter alia*, that testimony may be stricken even in the absence of contemporaneous objection).

jurisdiction, which is conferred either expressly or impliedly by the General Assembly.”). The instant matter is a rate adjustment proceeding pursuant to S.C. Code Ann. § 58-5-240 (Supp. 2004). Under subsection (A) of that statutory provision, a public utility is required to file a proposed rate schedule when it seeks to put into operation a change or changes in its rates. Subsequent to that filing, the legislature has directed that the Commission “shall, after notice to the public such as the Commission may prescribe, hold **a public hearing concerning the lawfulness or reasonableness of the proposed changes.**” See § 58-5-240(B) (emphasis supplied). Accordingly, the Commission may only conduct a public hearing in this matter to take testimony concerning the lawfulness or reasonableness of the Applicant’s proposed rates. Although they do not cite § 58-5-240(B), Commission Order Nos. 2005-92 and 2005-101 recognize the limitation upon the nature of the public hearings in this matter since they approve requests for a hearing to receive customer testimony “related to,” “concerning” or “relevant to” the Applicant’s rate case.²

The Applicant submits that specific customer statements alleging damage resulting from an act or failure to act by the Applicant does not bear upon the lawfulness or reasonableness of the proposed rates in this case. While the Commission may require a public utility to upgrade its system to address service quality issues before permitting it to charge the rates determined to be just and reasonable, the Commission is not authorized to deny rate relief based upon quality of service. *Cf. Patton v. S.C. Public Service Comm’n*, 280 S.C. 288, 312 S.E.2d 257 (1984). Moreover, the customer statements at the night hearings asserting the existence of sewer backups resulting in damage does not bear on the quality of the Applicant’s service which may be addressed through

²Even absent this limiting language, the Commission would not have authority to conduct a hearing in this docket for the purpose of receiving evidence not pertaining to the lawfulness and reasonableness of the Applicant’s proposed rates.

upgraded facilities. To the contrary, each alleged instance was specific to the witness and pertains only to isolated occurrences which clearly do not appertain to the vast majority of the Company's 9,700 sewer customers or facilities.³ Further, with respect to the assertions of damage to customer property, the Commission has no jurisdiction to resolve such disputes. Rather, the proper forum for a resolution of this issue is the circuit court as this Commission has recognized. *In Re: Bryant and Bryant v. CWS*, Docket No. 97-358-W, Order Nos. 97-1003 and 97-1066, Nov. 24, 1997 and Dec. 29, 1997. *Cf., In Re: Million v. Duke Power*, Docket No. 2002-401-E, Order No. 2003-116, March 5, 2003 (Commission holding that it lacks jurisdiction to address a tort claim, but may address electric customer allegation of inadequate service and demand for imposition of penalties in a complaint proceeding.)

Finally, consideration of customer complaints regarding sewer backups in the context of the instant proceeding will deny the Applicant due process. Under S.C. Const. art. I, § 22, the Commission cannot take any action affecting the Applicant or its customers without notice of its intent to do so having been given. *See Porter v. S.C. Public Service Comm'n*, 338 S.C. 164, 525 S.E.2d 866 (2000). The Applicant submits that neither the orders setting night hearings in this matter, nor the associated notices of hearing issued by the Commission Staff, inform the Applicant, its customers, or any other party that the Commission would be considering customer complaint issues in the context of the instant proceeding. Moreover, even if the subject orders and notices had

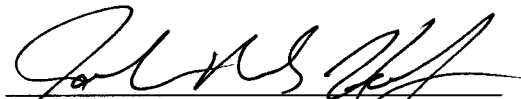
³The Applicant requests that the Commission take notice of the fact that, in the test year, no customer of the Company has filed a complaint under S.C. Code Ann. § 58-5-270 (1976) alleging that a sewer backup occurred because of an act or failure to act on the Applicant's part. The Applicant requests that the Commission further take notice of the fact that a complaint under § 58-9-270 pertaining to a sewer backup has not been filed against the Company since 1997. *See In Re: Rickey and Brenda Bryant v. Carolina Water Service, Inc.*, Docket No. 97-358-W, Order No. 97-1003, November 24, 1997.

so provided, a due process would still exist. “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *See S.C. Dep’t of Social Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). Accordingly, the Applicant must be given an opportunity to investigate the cause of customer complaints through an administrative process which includes pleadings, discovery if necessary, the pre-filing of testimony under oath, the submission of motions directed to same, and an opportunity to cross-examine witnesses under oath. That is why the General Assembly enacted S.C. Code Ann. § 58-5-270 and the Commission has promulgated 26 S.C. Code Ann. Regs. R. 103-821 and 835. The consideration of unsubstantiated allegations of property damage made for the first time in a night hearing falls far short of this due process requirement.

CONCLUSION

The Commission should not consider specific customer complaints regarding sewer backups in the context of the instant proceeding. It has no authority to do so under S.C. Code Ann. § 58-5-240 (Supp. 2004). Moreover, no notice that the Commission would do so has been provided to the Applicant, its customers, or the parties of record. The legislature has provided a specific procedure for considering such complaints in S.C. Code Ann. § 58-5-270 (1976) and the Commission has promulgated rules to implement that procedure. The Commission lacks jurisdiction to address damage claims and the consideration of customer statements pertaining to sewer backup, as bearing upon the Applicant’s entitlement to rate relief will deprive the Applicant of due process.

[SIGNATURE PAGE FOLLOWS]



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Attorney for Applicant

Columbia, South Carolina
This 26th day of April, 2005